LEMBAGA TATATERTIB PERKHIDMATAN AWAM HOSPITAL BESAR PULAU PINANG & ANOR

v.

UTRA BADI K PERUMAL

FEDERAL COURT, KUALA LUMPUR
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL MALEK AHMAD FCJ
AHMAD FAIRUZ FCJ
[CIVIL APPEAL NO: 01-2-2000(P)]
24 APRIL 2001

ADMINISTRATIVE LAW: *Exercise of administrative powers - Domestic discipline - Punishment - Mitigation - No opportunity of oral hearing before dismissal - Whether there was procedural fairness and natural justice - Whether respondent has a separate right to mitigate or make representations before punishment - Right to be heard - Whether art. 135(2) Federal Constitution complied with - Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, GO 26*

ADMINISTRATIVE LAW: *Public servants - Dismissal - Procedural fairness - Failure to provide oral hearing before imposition of punishment - Whether issuance of show cause letter tantamount to reasonable opportunity of being heard - Whether art. 135(2) Federal Constitution complied with*

PUBLIC SERVANTS: *Dismissal - Mitigation - General Order 26 of Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 - Right to mitigate on punishment - Whether disciplinary proceedings conducted under GO 26 requires hearing before imposing punishment - Procedural fairness - Absence of oral hearing - Whether in contravention of art. 135(2) of Federal Constitution*

CONSTITUTIONAL LAW: *Public servants - Disciplinary proceedings - General Order 26 of Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 - Right to mitigate on punishment of dismissal - Article 135(2) of Federal Constitution - Whether necessary to conduct oral hearing before meting out punishment*

The first appellant, the Lembaga Tatatertib Perkhidmatan Awam Hospital Pulau Pinang ('the disciplinary board'), had terminated the services of the respondent, Utra Badi, pursuant to a disciplinary proceeding conducted under general order 26 of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 ('the GO 26'). The respondent who contended that his dismissal

was unjust and that he should have been given an oral hearing prior to the punishment of dismissal being meted out against him then commenced proceedings against the disciplinary board in the High Court which decided in his favour. The matter proceeded to the Court of Appeal which decided that firstly, the respondent had been deprived of his right to make representations on punishment, and secondly, that there was failure of procedural fairness as the respondent was deprived of an oral hearing before the imposition of punishment.

The instant appeal was against the decisions of both the High Court and the Court of Appeal. The issues that arose were firstly, whether a show-cause letter issued by the disciplinary board prior to dismissing the respondent sufficiently complied with the requirement of giving a public officer a reasonable opportunity of being heard under art. 135(2) of the Federal Constitution and secondly, whether the disciplinary board was required to afford the respondent an oral hearing under art. 135(2) of the Federal Constitution.

It was the appellants' contention that since the disciplinary proceedings were conducted under GO 26, there was no provision on the right to be heard on the question of punishment. Furthermore, the show-cause letter provided an adequate opportunity to the respondent to submit upon the charge and the ensuing punishment.

Held:

Per Abdul Malek Ahmad FCJ

[1] Article 135(2) of the Federal Constitution prescribed that the respondent could only be dismissed if he had been given a reasonable opportunity of being heard.

[2] The overall effect of the show-cause letter was that the respondent had, at the earliest available moment, been informed of the possible punishments under consideration should he be unable to exculpate himself of the charges made against him. Thus, he had been accorded reasonable and sufficient opportunity to defend himself.

[3] The General Orders, in detailing the procedures therein, have sufficiently complied with art. 135(2) of the Federal Constitution, and in the process, are in accord with the concept of natural justice and procedural fairness.

[4] There is certainly no separate right to make representations upon the punishment to be meted out to the officer to be dismissed or reduced in rank. In fact, under GO 26(4), the disciplinary board was not even required to make a finding of guilt.

[5] The right to be heard as given by art. 135(2) of the Federal Constitution does not necessitate that the person concerned be given an oral hearing. Therefore, in the absence of such a hearing, one cannot conclude that it amounts to a denial of natural justice. In matters involving GO 26, the requirement of fairness is satisfied by an opportunity to make written representations to the deciding body.

[Appeal allowed with costs; decisions of the High Court and Court of Appeal set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu pertama, yakni Lembaga Tatatertib Perkhidmatan Awam Hospital Pulau Pinang ('lembaga berkenaan'), telah menamatkan perkhidmatan responden, Utra Badi, mengikut suatu prosiding tatatertib yang diadakan di bawah General Order 26 Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 ("GO 26"). Responden, dalam menegaskan bahawa pembuangan kerjanya adalah tidak adil dan bahawa dia sepatutnya dibicarakan secara lisan sebelum keputusan pemecatannya dikuatkuasakan, telah memulakan perbicaraan terhadap lembaga berkenaan dan Kerajaan Malaysia (perayu kedua) di Mahkamah Tinggi yang telah memberi keputusan bersokongan dengannya. Kes ini seterusnya dihadapkan ke Mahkamah Rayuan yang memutuskan bahawa pertamanya, responden kehilangan haknya untuk membuat representasi terhadap hukuman dan keduanya terdapat kegagalan dalam prosedur keadilan bilamana responden kehilangan hak perbicaraan secara lisan.

Ini adalah suatu rayuan terhadap keputusan-keputusan Mahkamah Tinggi dan Mahkamah Rayuan. Isu-isu yang timbul dalam perbicaraan ini adalah samada surat tunjuk sebab yang dikeluarkan oleh lembaga berkenaan sebelum pemecatan responden mematuhi secukupnya berkenaan dengan keperluan memberikan seorang pegawai kerajaan peluang yang setimpal untuk memperdengarkan kesnya di bawah art. 135(2) Perlembagaan Persekutuan dan keduanya, samada lembaga berkenaan dikehendaki memberi peluang kepada responden untuk suatu perbicaraan lisan di bawah art. 135(2) Perlembagaan Persekutuan.

Adalah aduan pihak perayu bahawa bilamana prosedur tatatertib diadakan di bawah GO 26, tidak terdapat peruntukan untuk memperdengarkan kes berkenaan dengan soal hukuman. Tambahan pula, surat tunjuk sebab telah memberikan responden peluang yang sewajarnya untuk menghujah berkenaan dengan pertuduhan dan hukuman yang berikutnya.

Diputuskan:
Oleh Abdul Malek Ahmad HMP

[1] Artikel 135(2) Perlembagaan Persekutuan memperuntukkan bahawa responden hanya boleh dipecat sekiranya dia telah diberi peluang yang munasabah untuk memperdengarkan kesnya.

[2] Kesan menyeluruh surat tunjuk sebab adalah responden telah, pada seawalnya yang mungkin, diberitahu mengenai hukuman-hukuman yang mungkin dipertimbangkan seandainya dia tidak berupaya untuk membebaskan dirinya dari tuduhan yang dihadapkan. Maka, dia telah diberi peluang yang cukup dan munasabah untuk membela dirinya.

[3] Perintah-perintah Am, dalam membutirkan prosedur-prosedur yang terkandung dalamnya, telah dengan cukupnya mematuhi art. 135(2) Perlembagaan Persekutuan, dan dalam prosesnya, selarasnya dengan konsep keadilan asasi dan prosedur yang adil.

[4] Adalah pasti bahawa tidak terdapat hak yang berasingan untuk membuat representasi terhadap hukuman yang akan dijatuhkan terhadap pegawai yang akan dipecat atau diturunkan pangkat. Pada hakikatnya, di bawah GO 26, perayu pertama tidak pun dikehendaki untuk membuat suatu keputusan bersalah.

[5] Hak untuk memperdengarkan kes yang diperuntukkan oleh art. 135(2) Perlembagaan Persekutuan tidak menghendaki orang berkenaan diberi perbicaraan secara lisan. Oleh itu, dalam ketiadaan perbicaraan seperti itu, seseorang tidak boleh membuat kesimpulan bahawa ia merupakan suatu penyangkalan keadilan asasi. Berkenaan dengan perkara-perkara yang melibatkan GO 26, keperluan keadilan dipenuhi melalui suatu peluang untuk membuat representasi secara bertulis kepada badan yang membuat keputusan.

[Rayuan dibenarkan dengan kos; keputusan Mahkamah Tinggi dan Mahkamah Rayuan diketepikan.]

Case(s) referred to:
AG, Singapore v. Lee Keng Kee [1982] 2 MLJ 6 ***(refd)***
Alan Noor Kamat v. Inspector-General of Police & Anor [1987] 1 CLJ 51 ***(refd)***
B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 28 MLJ 169 ***(refd)***
Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 3 CLJ 365 ***(refd)***
Ganasan Marimuthu v. Public Services Commission & Anor [1998] 4 CLJ 331 ***(refd)***
Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 ***(refd)***

Halimatussaadiah v. Public Services Commission, Malaysia & Anor [1992] 1 CLJ 413 ***(refd)***
High Commissioner for India and High Commissioner for Pakistan v. IM Lall LR vol lxxv 117 ***(refd)***
Hjh Halimatussaadiah Hj Kamaruddin v. Public Services Commission, Malaysia & Anor [1994] 3 CLJ 532 ***(refd)***
Najar Singh v. Government of Malaysia & Anor [1974] 1 MLJ 138 ***(refd)***
Samsuddin Mohd Saad v. Pengarah Hospital Bahagia, Ulu Kinta & Anor [1999] 1 CLJ 138 ***(refd)***
VC Jacob v. AG [1970] 2 MLJ 133 ***(refd)***
Yap Jack Keet v. Ketua Polis Negara & Anor [2000] 7 CLJ 74 ***(refd)***
Zainal Hashim v. Government of Malaysia [1979] 2 MLJ 276 ***(refd)***

Legislation referred to:
Federal Constitution, arts. 110(3), 135(2)
Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980, GOs 4(2)(d), 23, 25(2), 26(1), (2), (4), (11)(a), (b), (c), 36(i)

Government of India Act 1935, s. 240(1), (3)

Other source(s) referred to:
A Digest Of Dismissal And Reduction In Rank, LA Sheridan, *Public Law (The British Journal of Administrative Law 1962),* pp. 260, 284 & 285
The Public Service and Public Servants in Malaysia, VS Winslow, *The Constitution of Malaysia, Its Development: 1957-1977,* Tun Mohamed Suffian, HP Lee & FA Trindade, pp 290 & 291

Reported by Bhawani Mano

JUDGMENT

Abdul Malek Ahmad FCJ:

Leave had been granted by this court on 10 July 2000 on the following questions:

1. Whether a show cause letter issued by a Public Service Disciplinary Authority which directed a member of a public service's attention to the possibility of punishment of dismissal or reduction in rank sufficiently complied with the provisions of art. 135(2) of the Federal Constitution that no member of a public service shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard?; and

2. Does art. 135(2) of the Federal Constitution require the relevant disciplinary authority to afford the public officer an oral hearing?

The respondent was employed as a hospital attendant at the Penang General Hospital. No less than nineteen letters pertaining to the matter dated between 30 August 1990 to 25 July 1991 have been included in the appeal record but, for effect, we will refer only to the relevant ones. The first appellant issued him a show cause letter dated 31 January 1991 to institute disciplinary proceedings for dismissal or reduction in rank on the grounds that the respondent's urine sample taken on 5 May 1990 was positive of morphine in breach of para. (2)(d) of General Order 4 of the Public Officers (Conduct and Discipline) (Chapter "D") General Orders 1980 (hereinafter "the General Order"). As stated therein, an officer shall not conduct himself in such manner as to bring the public service into disrepute or to bring discredit thereto. Apparently, his drug addiction would bring disrepute to the public services. This letter was received on 5 February 1991.

On 7 February 1991, the respondent made representations to the first appellant. He denied that he was a drug addict and argued that there was a possibility that the relevant urine sample was not his but might belong to some other person. He pleaded to be given another opportunity to have his urine tested as he had no intention to taint his good service record. Further, he had never been subjected to any form of disciplinary action in his 27 years' service with the second appellant.

On 20 March 1991, the first appellant forwarded to the respondent a letter informing him that he had been dismissed under para. (i) of General Order 36 of the General Orders. The respondent was also informed that he had the right to appeal through his Head of Department to the Disciplinary Appeal Board.

This the respondent did by letter dated 26 March 1991 where he repeated what he had said in his letter dated 7 February 1991. He added that on 7 May 1990 (the correct date should have been 5 May 1990), he had been given an empty bottle with no label which could easily have subsequently been mixed up with someone else's urine sample and about that time he was taking "Linctus Codeine", a cough mixture, to cure his coughing. Further, the result was only made known to him about four and a half months later.

His appeal was dismissed by letter dated 4 July 1991 which was made known to him by letter dated 25 July 1991. On 20 November 1991, the respondent instituted proceedings against the appellants for wrongful dismissal. On 30 May 1996, the High Court decided in his favour.

On 3 May 1999, the Court of Appeal held, in dismissing the appeal, that the respondent had been deprived of his right to make representations on punishment. Secondly, there was failure of procedural fairness as the respondent was deprived of an oral hearing.

It is pertinent at this point to refer to the relevant passages in two of the three separate judgments of the Court of Appeal. The concluding paragraphs of the judgment by Siti Norma Yaakob, JCA (as she then was) are reproduced below:

> From the language of the show cause letter and in the light of the alternative punishments that might be imposed on the respondent, it was my considered opinion that the respondent should have been given the opportunity to plead in mitigation before any punishment was meted against him. This reasoning I say runs in line with the provisions of General Order 23 which states that in all disciplinary proceedings under Part II of the Code no officer shall be dismissed or reduced in rank unless he has been afforded a reasonable opportunity of being heard. My reasoning, too, harmonies with the provisions of art. 135(2) of the Federal Constitution which provides that no member of the public service **"shall be dismissed or reduced in rank without being given (a) reasonable opportunity of being heard"**.
>
> In the circumstances of this appeal, I say that the right to be heard extended not only to the first stage of the proceedings before the first appellant but also to the second stage before punishment was passed. In this instance the first appellant accorded the respondent the opportunity to be heard in answer to the charge but had denied his right to plead in mitigation before dismissing him. Since dismissal has been identified by the first appellant to be one of two punishments that could be imposed on the respondent and I am mindful that dismissal is the most extreme punishment that could befall a public servant, justice and fair play dictate that the right to plead in mitigation should have been accorded to the respondent although General Order 26 of the Code under which these proceedings were brought is silent on this score. Under these circumstances I say that the proceedings before the first appellant were flawed in that there had been procedural unfairness and as such cannot be sustained. For this very reason, we had dismissed the appeal, confirmed the orders of the learned trial judge but made no order as to costs as Counsel for the respondent was not invited to respond to the appellants' submission.

The first excerpt from the judgment of Gopal Sri Ram, JCA states:

> This issue in this appeal concerns the right to procedural fairness. It is a constitutional right. It forms one of the cornerstones of our public law jurisprudence. It is an issue which our courts have already dealt with in several cases. See, *Kanda v. The Government of Malaya* [1962] MLJ 169, *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487; *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan Anor* [1996] 1 MLJ 261 and the very recent decision of the Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor* [1999] 3 MLJ 1. Although the content of procedural fairness is well settled, its application varies according to the facts of each particular case. It is necessary to allude to the factual matrix relevant to this appeal in order to appreciate the issues.

And in the second excerpt of that judgment, it is said that:

> Procedural fairness demands not only the right in a public servant to make representations on the truth of the charges framed against him. It includes the right, after a finding of guilt is made against him, to make representations on the question of punishment. That this must be the case may be seen by examining the disciplinary process itself.
>
> In my view, the *obiter dictum* of the Supreme Court in *Inspector General of Police v. Alan Noor bin Kamat (ibid)* is plainly wrong. It was expressed without the benefit of a mature argument upon the combined effect of Articles 5(1) and 8(1) of the Federal Constitution. Neither did it have the benefit of the views expressed in several cases of high authority, including the decision of the Privy Council in *High Commissioner for India and High Commissioner for Pakistan v. Lall* LR 75 IA 225. In that case, the Board dealt with the identical issue that has arisen for consideration in the present appeal. The relevant provision in that case was section 240(3) of the Government of India Act 1935.

Learned leading senior federal counsel arguing on behalf of the appellants had referred to *B. Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 28 MLJ 169 where Lord Denning said at pp. 172 and 173 as follows:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, LC in *Board of Education v. Rice* [1911] AC 179, 182 down to the decision of their Lordships' Board in *Ceylon University v. Fernando* [1960] 1 WLR 223. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing. Instances which were cited to their Lordships were *Re Gregson* [1894] 70 LT 106, *Rex v. Bodmin Justices* [1947] KB 321 and *Goold v. Evans* [1951] 2 TLR 1189, to which might be added *Rex v. Architects Registration Tribunal* [1945] 2 All ER 131, and many others.
>
> Applying these principles their Lordships are of opinion that *Inspector Kanda* was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J in these words: "In my view, the frirnishing of a copy of the Findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to

such a denial of natural justice as to entitle this Court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal." The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships do not think it was correct to let him have the Report of the Board of Inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.

He also brought to our attention the text book entitled *Public Law incorporating The British Journal of Administrative Law 1962* with the article *A Digest Of Dismissal And Reduction In Rank* by L.A. Sheridan at p. 260 where, at pp. 284 and 285, the author states:

Normal Disciplinary Procedure in India and Pakistan

It is universally accepted that a Government servant has had a reasonable opportunity to show cause against the action proposed to be taken in regard to him if he has been fairly allowed to dispute both the grounds for and the nature of that action.

Generally speaking, there are three phases of a disciplinary proceeding against a civil servant. First, a complaint is made by someone inside or outside the department and the disciplinary authority decides, perhaps after making informal *ex parte* inquiries, whether any action is called for. This phase may be termed the preliminary investigation. If the disciplinary authority comes to the conclusion that action is called for against the alleged delinquent, an inquiry is held, by the disciplinary authority or by some civil servant or person outside the Government at his instigation, into whether the alleged delinquent has done whatever it is that forms the subject-matter of the complaint against him. This phase may be termed the inquiry as to guilt. After this inquiry is completed, the disciplinary authority decides on guilt. If the charges are found proved, the disciplinary authority considers punishment, and if this is tentatively decided to be dismissal, removal or reduction in rank, the delinquent is served with a notice to show cause against the proposed punishment, and there follows what might be termed the inquiry as to punishment. (In Malaya, however, there is no separate inquiry as to punishment, the constitution referring only to an opportunity of being heard). Finally, the disciplinary authority makes a decision as to punishment, which decision is then carried out. Of course, if the proposed dismissal, removal or reduction in rank is not to be imposed on the ground of some alleged delinquency then, if it is by way of punishment within the interpretation of article 311(2) and its equivalents, the phase of inquiry as to punishment will be where the proceedings begin: if it is not by way of punishment, the constitutional protection is not attracted.

The relevant provisions relating to procedure in cases meriting punishment of dismissal or reduction in rank are found in General Order 26 of the General Orders and it is pertinent to reproduce the said General Order in full:

> 26 (1) Where it is represented to, or is found by, the Appropriate Disciplinary Authority that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the Disciplinary Authority, merits dismissal or reduction in rank, the provisions of the following paragraphs shall apply.
>
> (2) The Appropriate Authority shall, after considering all the available information in its possession that there is a *prima facie* case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within a period of not less than fourteen days from the date of receipt of the letter a representation containing grounds upon which he relies to exculpate himself.
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> (3) If after consideration of the said representation, the Appropriate Disciplinary Authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such lesser punishment as it may deem fit.
>
> (4) If the officer does not furnish any representation within the specified time, or if the furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.
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> (5) Where the Appropriate Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry consisting of not less than two senior Government officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's Head of Department shall not be selected to be a member of the Committee.
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> (6) The officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the Committee and that he will be allowed and if the Committee shall so determined, shall be required to appear before the Committee and exculpate himself.
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> (7) If witnesses are examined by the Committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(8) The Committee may, permit the Government or the officer to be represented by an officer in the public service or, in exceptional cases, by an advocate and solicitor and may at any time, subject to such adjournment as is reasonably necessary to enable the officer to present his case in person, withdraw such permission.

Provided that where the Committee permits the Government to be represented, it shall also permit the officer to be similarly represented.

(9) If, during the course of the inquiry, further grounds for dismissal are disclosed, and the Appropriate Disciplinary Authority thinks fit to proceed against the officer upon such grounds, the officer shall be furnished with a written statement thereof and the same steps shall be taken as are prescribed above in respect of the original grounds.

(10) The Committee having inquired into the matter, shall make a report to the Appropriate Disciplinary Authority. If the Disciplinary Authority considers that the report is not clear in any respect or that further inquiry is desirable, the matter may be referred back to the Committee for further inquiry and report.

(11) If, upon considering the report of the Committee the Appropriate Disciplinary Authority is of the opinion:

(a) that the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly;

(b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, it may inflict upon the officer such lesser punishment as it may deem fit; or

(c) that the proceedings disclose sufficient grounds for requiring him to retire in the public interest, it shall recommend to the Government accordingly. The question of pension will be dealt with under the Pensions Act.

The point taken in the Court of Appeal was whether there had been procedural unfairness when the respondent was not given the opportunity to mitigate before the first appellant decided to dismiss him especially when more than one punishment had been held out as a possible punishment for the charge that he had been found guilty of.

It was the contention of the appellants that since the disciplinary proceedings were conducted pursuant to General Order 26 of the General Orders, there is no provision as to the right to be heard on the question of punishment. Moreover, in the relevant letter to show cause, the respondent had already been told of the two possible punishments both in the heading and body of the letter. We pause here to add that following the relevant paragraph of that letter stating the offence and the two possible punishments, it is also stated that the

respondent may be punished under General Order 36 of the General Orders which categorises seven other punishments as well. On this point, we had analysed the letter thoroughly. Actually, the first line of the second paragraph informs the respondent that on the information received, disciplinary action ought to be taken against him under General Order 26 of the General Orders with the intention of dismissal or reduction in rank. In the last line of that paragraph, however, the punishment, if the respondent is found guilty, would be under General Order 36. The first appellant does not actually mean that the respondent is liable for the other seven punishments as well except that the punishment to be imposed is pursuant to General Order 36, while the action is pursuant to General Order 26, of the General Orders. The appellants further contend that the respondent should have taken the opportunity to mitigate on the punishment as well at that stage which he failed to do.

On this issue, the case of *Alan Noor bin Kamat v. Inspector-General of Police & Anor* [1987] 1 CLJ 51 was cited. The plaintiff there had received a letter on 14 May 1980 asking him to show cause within fifteen days why disciplinary action should not be taken against him. The letter purported to be on the instructions of the Deputy Inspector-General of Police in exercise of disciplinary powers delegated to him by the Police Force Commission. The plaintiff's reply was out of time by ten days. On 21 August 1981, the Inspector-General of Police imposed on the plaintiff the punishment of demotion to his original rank on the first charge and fines for the second and third charges.

The High Court, in holding that the delegated power to institute disciplinary proceedings is personal to the Inspector-General of Police and since it was his deputy who had initiated them in this case, the only way to rectify the position was to institute fresh disciplinary proceedings in the proper manner.

Apart from that, it also held:

> (2) After having considered all available information in his possession that there was a *prima facie* case against the plaintiff for dismissal or reduction in rank it behoved the IGP as the disciplinary authority to send to the plaintiff a statement in writing containing the grounds on which it was proposed to dismiss or reduce him in rank and giving him not less than 14 days to submit in writing grounds upon which he relied to exculpate himself. Under Regulation 30(2) mention of the proposed punishment is incumbent upon the authority. This omission rendered the letter of 14 May 1980 nugatory.

(3) The plaintiff should have been given an opportunity to make a plea in mitigation on punishment. This right is implied in Regulation 27 of the General Orders and in Article 135(2) of the Federal Constitution for otherwise it cannot be said that the plaintiff had been given a reasonable opportunity of being heard.

The Supreme Court dismissed both the appeal and the cross appeal with costs. The learned judges also disagreed with the learned High Court judge as to the institution of fresh disciplinary proceedings as the matter was *res judicata*.

What is relevant to our appeal, however, is the following excerpts from the Supreme Court judgment delivered by Salleh Abas, LP:

> Reduction in rank and dismissal are the two most severe punishments that can be imposed upon a civil servant guilty of misconduct. For this reason, the proceedings with a view to dismissal or reduction in rank have to be slightly different in that the show cause letter must bring to the attention of the civil servant concerned of the contemplated punishments to make him appreciate the gravity of the situation and thus enable him to give a satisfactory explanation as best as he could. This is clear from the wording contained in paragraph (2) of G.O.D. 30, ie, "a statement in writing, prepared, if necessary, with the aid of the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank ..." This phraseology "of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank", however, does not appear in G.O.D. 29 which deals with disciplinary proceedings not meriting punishment of dismissal or reduction in rank.
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> Looking at the show cause letter dated May 14, 1980, we see nothing in it which shows that the Disciplinary Authority intended or contemplated the punishment of (dismissal or) reduction in rank. It is not therefore surprising for the respondent to reply to the allegation of misconduct without assistance of counsel which he said in his evidence he would have done if he had known the gravity of the situation he had to face.
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> Furthermore, the time lapse between his reply and the punishment clearly gave him hope that whatever punishment to be imposed on him will not be so serious as the one actually imposed. In our view, the Disciplinary Authority here made a fatal mistake which rendered the disciplinary proceedings null and void.
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> Before concluding this judgment, we wish to make here an observation on the following passage of the judgment of the learned judge in the court below:
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> > The plaintiff sent a reply to the Deputy Inspector-General of Police on 7 June 1980 giving his explanations on the 3 charges. After considering these explanations and having found that the plaintiff had failed to exculpate himself it was incumbent upon the Inspector-General of Police thereafter to give the plaintiff an opportunity to make a plea in

> mitigation on punishment. This right of the plaintiff to be heard in mitigation is implied in regulation 27 of the General Orders and in Article 135(2) of the Federal Constitution for otherwise it cannot be said that the plaintiff had been given a reasonable opportunity of being heard. He had to be heard throughout the proceedings from the beginning to the end. Isn't it a fair and reasonable expectation of any person condemned for a wrong that he would be heard in mitigation before any punishment is imposed on him?
>
> As it stands, this passage appears to be misleading. This passage should be read in the light of the factual situation of this case, wherein the show cause letter dated May 14, 1980 was completely silent as to the contemplated punishment to be imposed at the end of the disciplinary proceedings. Therefore, in order to ensure that the respondent understood and appreciated the seriousness of the proceedings he was facing, the learned trial judge was right in insisting that another chance must be given to him, which he called a plea of mitigation. If, however, the show cause letter had included the proposed punishment, for example, by the inclusion of such statement as "This proceeding is taken against you with a view to dismissal or reduction in rank ..." or "This proceeding is taken under G.O.D. 30 with a view to dismissal or reduction in rank ...", or such other phraseology as would give the effect of making the respondent understand the nature of the proceedings and what that would lead to, there is no necessity for the appellants to give another opportunity of being heard before the punishment is imposed.

What is the bone of contention here is the last line of that passage. The effect is if the show cause letter had put the officer on notice as regards the two most severe punishments for misconduct, there is no need for him to be given another opportunity of being heard before the punishment is imposed.

The learned High Court judge in the instant case held that this line was made *obiter*. This was also the view of Siti Norma Yaakob JCA (as she then was).

Referring to the same passage, Gopal Sri Ram, JCA had this to say:

> Having regard to the appellants' arguments, it is necessary now to see if, on an application of established tests, whether the foregoing remarks from part of the *ratio decidendi* or are mere *obiter dictum.*
>
> In *Co-operative Central Bank Ltd. v. Feyen Development Sdn. Bhd* [1997] 3 CLJ 365, at p. 372, Edgar Joseph Jr. FCJ, explained the distinction between these two parts of a judgment as follows:
>
> > *[O]biter dictum* is a mere chance remark by the court and is used in contradistinction to *ratio decidendi* – the rule of law for which a case is authority.

An authoritative description of what constitutes the *ratio decidendi* of a case was rendered by Schreiner J.A., in *Pretoria City Council v. Levison* [1949] 3 SA 405, at p. 417:

> As I understand the ordinary usage in this connection, where a single judgment is in question, the reasons given in the judgment, properly interpreted, do constitute the *ratio decidendi*, originating or following a legal rule, provided (a) that they do not appear from the judgment itself to have been merely subsidiary reasons for following the main principle or principles, (b) that they were not merely a course of reasoning on the facts and (c) (this may cover (a)) that they were necessary for the decision, not in the sense that it could not have been reached along other lines, but in the sense that along the lines actually followed in the judgment the result would have been different but for the reasons.

Schreiner JA, had in mind a single judgment of a court when he suggested the foregoing test. This Court is also concerned only with a single judgment of the Supreme Court. Hence, I consider it quite safe to apply the approach suggested by Schreiner J.A., when interpreting the judgment of the Supreme Court in *Inspector General of Police v. Alan Noor bin Kamat (supra)*.

Applying that test, the finding by the Supreme Court on the first of the two issues that arose for its decision is certainly *ratio decidendi*. The decision upon the second issue **may** also be part of the *ratio*. I say "may" advisedly, because it was not strictly necessary for the Court to have entered upon the second issue in light of the learned Lord President's concluding remarks on the first issue. Nevertheless, I am, *ex abundanti cautela*, prepared to accept the finding upon the second issue also as part of the *ratio* on the basis that a judgment may have more than one *ratio*. However, I am unable, on a proper application of the test, accept the remark of the learned Lord President that "there is no necessity for the appellants to give another opportunity of being heard before the punishment is imposed" as forming part of the *ratio* in *Alan Noor*'s case.

I am therefore satisfied that both Ajaib Singh J's remark at first instance and the Supreme Court's comment upon it on the appeal in *Inspector General of Police v. Alan Noor bin Kamat (ibid)* are both merely *obiter dicta* as they were unnecessary for the actual decision in that case. It follows that I am in agreement with the learned trial judge in his interpretation of that case. I must, for that reason, reject the first submission advanced by the appellants in criticism of the learned judge (on) this part of his judgment.

That brings me to the appellants' second argument. What is urged upon this Court is the proposition that in disciplinary proceedings brought against a member of the public service, there is no separate right (or the legitimate expectation of a right) to make representations upon the question of the punishment that ought to be meted out to him.

To recapitulate, in *Inspector General of Police v. Alan Noor bin Kamat (ibid)*, Ajaib Singh J, at first instance, took the view that the disciplinary process involved two separate exercises, the first a finding as to guilt and the second as to punishment. However, the Supreme Court was of the opinion that both guilt and punishment are to be considered in one composite exercise. That, in essence, is the difference in the approach.

With much respect, I am unable to accept the view subscribed to by the Supreme Court. In my judgment, save in those cases falling under Part III of the General Orders, there are two separate and distinct steps in the public service disciplinary process. The first step is for the disciplinary authority to decide upon the issue of guilt or innocence. If the decision is in favour of the employee, that is the end of the matter. But if the relevant authority finds the public servant guilty, then, and then only, does the question of punishment arise. And as may be seen from General Order 36 that there is a wide choice in the type of punishment that may be meted out. As may be seen from General Order 36, it ranges from a mere warning to the ultimate punishment of dismissal.

In a later part of the judgment, he held:

Procedural fairness demands not only the right in a public servant to make representations on the truth of the charges framed against him. It includes the right, after a finding of guilt is made against him, to make representations on the question of punishment. That this must be the case may be seen by examining the disciplinary process itself.

In my view, the *obiter dictum* of the Supreme Court in *Inspector General of Police v. Alan Noor bin Kamat (ibid)* is plainly wrong. It was expressed without the benefit of a mature argument upon the combined effect of Articles 5(1) and 8(1) of the Federal Constitution. Neither did it have the benefit of the views expressed in several cases of high authority, including the decision of the Privy Council in *High Commissioner for India and High Commissioner for Pakistan v. Lall* LR 75 IA 225.

On a proper analysis of the cases cited, however, we were of the considered opinion that the remarks made in *Alan Noor bin Kamat*'s case formed part of the *ratio*. It was not a mere chance remark, nor a subsidiary reason for the main principle and the finding was quite necessary for the decision reached.

Article 135(2) of the Federal Constitution reads:

(2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:

Provided that this clause shall not apply to the following cases:

(a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him; or

(b) where the authority empowered to dismiss or reduce in rank a member of such a service is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to carry out the requirements of this clause; or

(c) where the Yang di-Pertuan Agong, or in the case of a member of the public service of a State, the Ruler or Yang di-Pertua Negeri of that State, is satisfied that in the interests of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this Clause; or

(d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member of any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls.

Provided further that for the purpose of this Article, where the service of a member of such a service is terminated in the public interest under any law for the time being in force or under any regulation made by the Yang di-Pertuan Agong under Clause (2) of Article 132, such termination of service shall not constitute dismissal whether or not the decision to terminate the service is connected with the misconduct of or unsatisfactory performance of duty by such member in relation to his office or the consequences of the termination involved an element of punishment; and this proviso shall be deemed to have been an integral part of this Article as from Merdeka Day.

In effect, the above provision prescribes that the respondent can only be dismissed if he has been given a reasonable opportunity to be heard. As submitted by the learned leading senior federal counsel, the letter to the respondent to show cause dated 31 January 1991 conveyed with sufficient clarity and certainty the contemplated punishment namely dismissal or reduction in rank.

The grounds were fully spelt out in the letter and the charge was well drafted as it laid down all the important and relevant particulars. Any reasonable person would have had no difficulty in responding to the allegations made. The opportunity, reasonable and sufficient, was given to the respondent to make a representation to rebut the charge.

In essence, the undoubted overall effect of the show cause letter illustrated that the respondent had at the earliest available moment been informed of the two possible punishments under consideration should he not be able to exculpate himself of the charge made. With all these in mind, he had been accorded every opportunity to defend himself.

This was in fact what the respondent did by letter dated 7 February 1991. However, he made no representation as regards punishment though he had been made aware of the two possibilities. Can he now say that he had been deprived of that opportunity?

The issue that arises is whether, with art. 135(2) of the Federal Constitution in mind, that provision gave the respondent the right to make a plea in mitigation before punishment is imposed.

This very provision had been dealt with some thirty nine years ago, as submitted by learned leading senior federal counsel, in *B. Surinder Singh Kanda v. The Government of the Federation of Malaya (supra)* and the relevant passages have been referred to earlier in this judgment. However, this decision was in relation to the question as to whether the hearing by the adjudicating officer was vitiated by his being furnished with the report of the Board of Inquiry, which contained a severe condemnation of the appellant, without the appellant being given any opportunity of correcting or contradicting it.

Earlier, however, when the same matter came up in the Court of Appeal, the point as to whether the opportunity to be heard should be given twice, that is once before being found guilty and once after, had arisen for consideration.

Thomson, CJ had remarked:

> Then it was said that after he had been informed that the charges against him were found proved *Inspector Kanda* was entitled to a second hearing by the Commissioner of Police in person to show cause why the punishment of dismissal should not in the circumstances be inflicted upon him.

Hill, JA dealt with the issue in the following manner:

> The respondent's case was that in breach of the provision of Article 135(2) of the Constitution he had been dismissed without being given a reasonable opportunity of being heard (a) before conviction, and (b) after conviction and before sentence.
>
> It is possible that the Adjudicating Officer was unconsciously prejudiced owing to the procedure adopted, but there is no evidence that he was. On the contrary, with reference to two witnesses who the Adjudicating Officer was instructed to call after the termination of his inquiry on 10 May 1958, he had this to say (page 82 of record):
>
> In considering which witnesses should be called at the Defaulter Report proceedings I had deliberately omitted calling these two witnesses since I realized that their evidence might be very prejudicial to the accused.
>
> To my mind such a statement indicated a complete lack of bias on the part of the Adjudicating Officer.

He had, a few paragraphs later, said:

> Article 135(2) of the Constitution states that no member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.
>
> On this aspect of the case the learned trial Judge found as follows: (p. 129 and 130 of record).
>
> > The argument put forward on ground (a) is that copies of various statements made by witnesses and copies of Police documents for which he had asked before his trial as being relevant to his defence were either not supplied to him at all, or supplied too late to give him an adequate opportunity to prepare his defence. Subject to one vitally important qualification, to which I shall later refer, I am satisfied that copies of all documents relevant to his defence were supplied to him, and I find no substance in this contention.
> >
> > As to ground (b), Mr. Jagjit Singh submitted on the authority of the decision of the Privy Council in the case of the *High Commissioner for India v. IM Lall* AIR [1948] PC 121 that the plaintiff had a right to be heard both at the time when the charges against him were being inquired into by the Adjudicating Officer and after conviction when the question arose as to the proper punishment to be awarded. I accept that as correct. I have already said that I am satisfied that the Adjudicating Officer, after notifying the plaintiff that the case against him on the original charge had been proved, intimated to him sufficiently clearly that in view of the serious nature of the charge he proposed to recommend his dismissal. The plaintiff was then asked if he had anything to say and what he did say was duly recorded by the Adjudicating Officer and forwarded to the Commissioner of Police, for his consideration as to whether or not he should confirm the recommendation for his dismissal. In my view that was a sufficient compliance with the requirements of Article 135(2).
> >
> > With this finding I respectfully agree and this quite irrespective of whether the decision of the Privy Council in the case of the *High Commissioner for India v. IM Lal (supra)* applies.

Neal, J had this to say:

> As to the first point the respondent relies upon, as did the Judge in the Court below, the Indian decisions. For myself, I derive no assistance from the Indian decisions having regard to the differences between the provisions of the Constitution in India and the Constitution here. It is not in dispute that the respondent had the opportunity to make and did make before the Adjudicating Officer after he had reached a finding of guilt a plea in mitigation. Put in other words, he had received and exercised the same rights as are accorded to an accused person in the Courts and I see no reason to so widely construe Article 135(1) as to give him the additional right which is sought.

Another Privy Council decision is *High Commissioner for India and High Commissioner for Pakistan v. IM Lall (supra)* as reported in LR Vol. LXXV. 117 where it was held that first, that the provision in sub-s. 3 of s. 240 of the Government of India Act 1935 (hereinafter "the GOIA") as to a reasonable opportunity of showing cause against the action proposed is mandatory and necessarily qualifies the provisions of sub-s. 1 and provides a condition precedent to His Majesty's exercise of his power of dismissal provided by sub-s. 1 and secondly, that no action is proposed within the meaning of sub-s. 3 of s. 240 of the GOIA until a definite conclusion has been come to on the charges brought against a civil servant and the actual punishment to follow is provisionally determined on. Before that stage, the charges are unproved and the suggested punishments are merely hypothetical. It is on that stage being reached that the GOIA gives the civil servant the opportunity for which sub-s. 3 makes provision. Accordingly, where it was not disputed that on that construction of sub-s. 3 of s. 240 of the GOIA the respondent, a member of the Indian Civil Service against whom an order of dismissal had been made by the Secretary of State for India following an inquiry into charges alleging improper nepotism and victimization of certain junior officials, had not been given the opportunity he was entitled to under sub-s. 3 of showing cause against the order of dismissal, the purported removal of the respondent from his office did not conform to the mandatory requirements of sub-s. 3 and was void and inoperative.

For a proper understanding of the matter, it is useful to reproduce s. 240 of the GOIA:

> 240 (1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown of India, holds office during His Majesty's pleasure.
>
> (2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.
>
> (3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:
>
> Provided that this sub-section shall not apply:
>
> (a) where a person is dismissed or reduced in rank on the ground on conduct which has led to his conviction on a criminal charge; or
>
> (b) where an authority empowered do dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity of showing cause.

(4) Notwithstanding that a person holding a civil post under the Crown in India holds office during His Majesty's pleasure, any contract under which a person, not being a member of a civil service of the Crown in India, is appointed under this Act to hold such a post may, if the Governor-General, or, as the case may be, the Governor, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post.

Learned leading senior federal counsel made a clear distinction of the words found in our art. 135(2) of the Federal Constitution and s. 240(3) of the GOIA. In the former the expression is "a reasonable opportunity of being heard" whereas in the latter it is "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him".

This distinction has been judicially considered by Wee Chong Jin, CJ in the High Court at Singapore in *V.C. Jacob v. Attorney Genera*l [1970] 2 MLJ 133 as follows:

The third and last argument relied on in relation to article 135(2) is that he was denied the right to make representations before the committee of inquiry on the penalty proposed to be imposed on him. Reliance is placed on a passage at page 61 of *Basu's Commentary on the Constitution of India*, 4th ed. Vol. 5 which runs thus:

Under cl. (2) as it stood prior to the Constitution (Fifteenth Amendment) Act, 1963, it was settled that in cases where Art. 311(2) was attracted, the employee charged had the right to reasonable opportunity to show cause twice, before the order of dismissal, etc., is passed.

The Supreme Court of India in *Khem Chand v. Union of India* AIR [1958] SC 300 50 decided. Article 311(2) of the Indian Constitution prior to 1963 is, however, different from our article 135(2) and is in the following terms:

No such person as aforesaid shall be dismissed or removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him.

The Indian article 311(2) is thus different from the Malaysian article 135(2). In Malaysia the right given is "a reasonable opportunity to be heard" whereas in India the right given is "a reasonable opportunity of showing cause against the action proposed to be taken in regard to him." On the wording of the Indian Constitution I would, respectfully, agree with the decision of the Indian Supreme Court in *Khem Chand*'s case which would be a highly persuasive authority, and one I would adopt, if the Malaysian Article 135(2) were in similar terms.

However, the point that was taken by the plaintiff in his statement of claim as amended on the day of the hearing and that was urged before me by his counsel at the hearing, is that under article 135(2) the committee of inquiry must, *inter alia*, give the plaintiff the right to make representations as to the punishment to be imposed. The relevant facts, which are not in dispute commence from the said letter dated 26th June 1963 written by the Permanent Secretary (Health) to the plaintiff. It is to be observed that in that letter the plaintiff was informed in clear language that the question of his dismissal from the public service on grounds fully spelt out in the letter was under consideration. It is also to be observed that the chairman of the committee of inquiry informed him by letter on 25th October 1963 that the "question of your dismissal" will come up on the 4th November 1963.

In my opinion the plaintiff was left in no doubt at all that if the charges against him were proved he might suffer the extreme penalty of all, namely dismissal from the public service. It follows, in my view, that he had, at the earliest stage in the matter, been afforded the opportunity to make representations to the committee of inquiry, if he so wished, as to why he should not suffer the contemplated penalty of dismissal on the charges enumerated against him. He could have availed himself of the opportunity to be heard on the contemplated dismissal.

Lastly, it is clear from a perusal of the record of the evidence and the statements before the committee of inquiry that the plaintiff did not avail himself of the opportunity to make representations on the question of punishment and it is not alleged that there was any refusal on the part of the committee of inquiry to hear him on the question of punishment. It follows, in my judgment, on the pleadings, on the arguments put forward on behalf of the plaintiff by his counsel and on the facts that the committee of inquiry did not fail to give nor did it deny the plaintiff the right to make representations on the question of punishment.

In a subsequent Singapore case namely *The Attorney-General, Singapore v. Lee Keng Kee* [1982] 2 MLJ 6, it was an appeal from the decision of the learned trial judge holding the dismissal of the respondent from the Police Force as being null and void and that the respondent was still an Inspector in the Police Force and was entitled to be remunerated as such. The learned judge held that the respondent was not given a reasonable opportunity of being heard before he was dismissed and was accordingly denied his constitutional rights as a police officer under art. 110(3) of the Constitution.

It was held by the Court of Appeal in allowing the appeal that the learned trial judge had erred in holding that the requirements of art. 110(3) of the Constitution had not been complied with. He had failed to give weight to the letter of the Acting Permanent Secretary and had misunderstood the decision in *Jacob v. Attorney-General (supra)*. The respondent had been informed at

the earliest stage that a range of punishments, including dismissal, was under consideration. Although he did not avail himself of the opportunity, the respondent was nevertheless afforded the opportunity of being heard on the contemplated dismissal.

And, as stated by Thomson, CJ in *Government of the Federation of Malaya v. Surinder Singh Kanda (supra)*:

> That argument is based on the case of *The High Commissioner for India & Anor. v. IM* Lall AIR [1948] PC 121 where in effect it was held that a member of the Indian Civil Service against whom disciplinary charges were made was entitled to be heard not only before the officer enquiring into these charges but also when the report of such officer was brought to the Public Services Commission with a view to his dismissal. That case, however, turned on the nature of the arrangements for disciplinary proceedings against civil servants in India which differ from those here and on the wording of section 240(3) of the Government of India Act 1935 (now Article 311(1) of the Indian Constitution) which differs from the wording of Article 135(2) of our Constitution. In India an officer is not to be dismissed without being given a reasonable opportunity "of showing cause against the action proposed to be taken in regard to him", whereas with us the requirement is simply that he shall be "given a reasonable opportunity of being heard". In this connection, too, it must be borne in mind that here a Police Officer dealt with by the Commissioner of Police has a right of appeal which was in fact exercised by Inspector Kanda whereas in India there would appear to be no appeal from a decision of the Public Service Commission.

Because of the marked difference between the Malaysian and Indian provisions on this question, we found it irrelevant and unnecessary to rely on the Indian authorities listed in the respondent's bundle of authorities.

A similar fact situation had occurred in the Court of Appeal case of *Ganasan a/l Marimuthu v. Public Services Commission & Anor.* [1998] 4 CLJ 331. There, the appellant joined the Telekoms department as a junior technician. He was later promoted to technician and was employed by the Government of Malaysia in the general public service of the federation. The plaintiff was served with a letter informing him of two grounds on which it was proposed to dismiss him from the public service and giving him twenty days from the receipt of the letter to state in writing a representation containing grounds upon which he relies to exculpate himself. The plaintiff replied by his letter dated 21 August 1986 in which he denied both charges. However, he failed to present a case of substance to the deciding body which could have exculpated him or which would be enough for the disciplinary authority to call for further clarification and appoint a committee of inquiry in the case against him. The appellant alleged that the first respondent had acted in breach of natural justice as regards his dismissal. At the trial, the appellant contended that the decision

to dismiss him was null and void and of no effect on the ground that he had requested and had been denied legal representation in relation to the charges against him. The judge below dismissed his action, and he appealed. As a member of the public service, General Order 23 of the General Orders was applicable to him. This provision requires that before he can be dismissed, he must be given an opportunity of being heard.

In delivering the judgment of the court, NH Chan, JCA said:

> Just in the instant case, it was only the representations the appellant had made in writing failed to exculpate him that he was dismissed (general order 26(4)). General order 26(4) makes no provision for an oral hearing if the officer fails to make representations in writing or the representations he makes in writing do not exculpate him. Equally, it makes no provision for him or his legal representative to appear before any person or body at that stage which is only for stating his case in a written representation (for which the appellant was given a full opportunity to do so (general order 26(2)) and indeed he had already availed himself of that opportunity), and if this fails to exculpate him to the satisfaction of the appropriate disciplinary authority, that authority will proceed to consider and decide on the dismissal or reduction in rank of the officer.
>
> There is at that stage (general order 26(2) stage), of course, no impediment for a lawyer to draw up the written representations for the officer or to advise him on how to put together the representations in writing. Indeed, the Supreme Court felt that the written representations in *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 have been written with the benefit of the advice of a lawyer (at p. 130).
>
> It is only if a committee of inquiry is appointed because the disciplinary authority requires further clarification in the case against the officer (general order 26(5)), that he will have the opportunity of giving oral testimony to exculpate himself (general order 26(6)). It is only then that the committee has discretion to allow him to be represented by an officer of the public service or, in exceptional cases, by an advocate and solicitor (general order 26(8)).
>
> The following remarks from the judgment of Lord Shaw of Dunfermline in *Local Government Board v. Arlidge* [1915] AC 120 at p. 138 (which spoke of the means to act justly and to reach just ends by just means in relation to natural justice in administrative law) are appropriate to the procedure in general order 26:
>
> > ... If a statute prescribes the means it (ie, the deciding body) must employ them. If it is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated; and lawyer-like methods may find especial favour from lawyers. But that the judiciary should presume to impose its own methods on administrative

> or executive officers is a u(n)surpation. And the assumption that the methods of natural justice are *ex necessitate* those of courts of justice is wholly unfounded. This is expressly applicable to steps of procedure ...

The underlying effect of the judgments in both the courts below is that there should be two stages before dismissal can really take place. In short, the officer concerned is entitled to two chances, one before he is found guilty of the offence and one after.

We had taken pains to identify three situations in the General Orders to make a comparison as to the real intention of the legislature. For the procedure in cases meriting punishment lesser than dismissal or reduction in rank, para. 2 of General Order 25 of the General Orders states:

> (2) After considering the representation under paragraph (1), the Appropriate Disciplinary Authority shall determine whether or not the officer is guilty of the alleged breach of discipline and if it determines that he is guilty thereof it shall impose any one or more of the punishments specified in General Order 36.

This indicates that the moment the officer is found guilty, he can straight away be punished accordingly.

For the procedure in cases meriting punishment of dismissal or reduction in rank where further clarification is required and a Committee of Inquiry is appointed, para. (11) of General Order 26 of the General Orders declares as follows:

> (11) If, upon considering the report of the Committee the Appropriate Disciplinary Authority is of the opinion:
>
> (a) that the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly;
>
> (b) that the officer does not deserve to be dismissed or reduced in rank, but deserves some lesser punishment, it may inflict upon the officer such lesser punishment as it may deem fit; or
>
> (c) that the proceedings disclose sufficient grounds for requiring him to retire in the public interest, it shall recommend to the Government accordingly. The question of pension will be dealt with under the Pensions Act.

In sub-para. (a), the use of the word "forthwith" is a clear indication of an immediate punishment. Despite not being as direct as sub-para. (a), sub-paras. (b) and (c) also, in our view, appear to indicate that same intention.

We next look at para. (4) of General Order 26 of the General Orders which is the very paragraph affecting the leave question. As stated earlier in this judgment, it reads:

> (4) If the officer does not furnish any representation within the specified time, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Appropriate Disciplinary Authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

Would the words "it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer" mean that there should be another separate hearing just to consider that after asking for the officer's views again? We do not think so.

This very General Order was the subject of argument in *Halimatussaadiah v. Public Service Commission, Malaysia & Anor* [1992] 1 CLJ 413. Eusoff Chin, J (as he then was) in the High Court held that O. 26(4) of the GO 'D' does not require the Public Service Comission to make a finding of guilt before dismissing the plaintiff. The Public Service Commission was only required to decide whether the plaintiff's explanation had exculpated her to the satisfaction of the Public Services Commission.

At the appeal before the Supreme Court, Mohamed Dzaiddin SCJ (as he then was) in delivering the judgment of the court in *Hjh Halimatussaadiah bte Hj Kamaruddin v. Public Services Commission, Malaysia & Anor* [1994] 3 CLJ 532 said at p. 537 as follows:

> The procedure adopted by the chairman of the disciplinary board and the PSC, in our view, followed strictly orders 24 and 26 of the GO 'D'. The appellant was given every opportunity to exculpate herself. It is clear from the evidence that the chairman of the disciplinary board, upon receipt of the report from the State Legal Adviser, Perak, of the appellant's refusal to comply with the said service circular, decided under order 24 of GO 'D' that proceedings for dismissal should be taken against her. The chairman then referred the matter to the PSC for further action. The PSC accordingly wrote to the appellant a show cause letter which included a charge as to why she should not be dismissed from public service. The appellant then gave a reply in the form of an exculpatory representation, giving her reasons why she would continue to wear the purdah. Order 26(4) states that if the officer furnishes a representation which fails to exculpate himself to the satisfaction of the appropriate disciplinary authority, it shall then proceed to consider and decide on the dismissal or reduction in rank of the officer. After due consideration, the PSC decided on 10 November 1986 to dismiss her from service. The letter of dismissal was sent to her on 16 December 1986. In the result, the appellant's first ground must fail.

About four months earlier, the same court in *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333 had ruled that the respondent had complied with the provisions of General Order 23 and General Order 26 of the General Orders. Following the procedure set out in General Order 26, the respondent had correctly sent the appellant a show cause letter following closely the provisions of paras. (1), (2) and (4). The show cause letter set out the grounds on which it was proposed to dismiss the appellant and invited him to furnish the respondent with a written statement which was accordingly furnished in great detail. Only when the respondent was satisfied that the written representation did not exculpate the appellant did he decide to dismiss him. Under para. (4) of General Order 26, only if the respondent considers that the case against the appellant requires further clarification is he obliged to appoint a committee of inquiry. In such an event, both parties may be legally represented. Under the circumstances, the procedure adopted by the respondent did not in any way involve prejudice to the appellant.

Taking all the above into consideration, we are of the view that the General Orders, in detailing the procedures therein, have sufficiently complied with art. 135(2) of the Federal Constitution and, in the process, are in accord with the concept of natural justice and procedural fairness. As succinctly stated by the learned leading senior federal counsel in his submissions and as propounded in the long line of authorities considered, there is certainly no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank. In fact, under para. (4) of General Order 26 of the General Orders, the first appellant is not even required to make a finding of guilt which strongly indicate that there is only one hearing for a show cause letter issued under that General Order. We therefore find that no injustice had been occasioned to the respondent by the failure to hear his mitigation separately.

After preparing this judgment, and in the course of going through the other authorities enclosed in the bundles prepared by both sides, we came across two High Court cases that have reached a conclusion different from the High Court decision made in this appeal. We accordingly felt it was worthwhile to include them.

In the case of *Samsuddin bin Mohd Saad v. Pengarah Hospital Bahagia, Ulu Kinta & Anor* [1999] 1 CLJ 138, where the facts run along the same lines as the instant appeal, the plaintiff was a former hospital attendant at a mental hospital who was dismissed for assaulting a patient. The allegation was based on a superior's report. Before his dismissal, he received a letter from the Public Service Disciplinary Authority requesting him to show cause why a disciplinary

action with a view to dismissal should not be taken against him. The plaintiff replied, denying the charges. He was then required to attend a hearing of the Disciplinary Action Authority where he categorically denied having assaulted the patient. He was dismissed and his appeal to the Disciplinary Appeals Authority was rejected. In this action, the plaintiff claimed that in dismissing him, the defendants:

(a) followed the wrong and improper procedure;

(b) did not conduct a proper enquiry to determine the truth of the allegation;

(c) denied the plaintiff the opportunity to cross-examine witnesses and to call his own witnesses in his defence at the enquiry; and

(d) denied the plaintiff the opportunity to mitigate before sentence was meted out.

The plaintiff sought a declaration that his dismissal was unlawful and of no legal effect and that he was entitled to all the salaries and benefits due, and claimed damages for wrongful dismissal and costs.

In a well reasoned judgment, Kang Hwee Gee, J stated as follows:

> Mitigation before sentence
>
> To consider the submission, it is first necessary to examine within the context of the General Orders whether an officer has the right to plead in mitigation as a separate exercise before the disciplinary authority decides to dismiss him. The authority on this point is to be found in the Supreme Court case of *Inspector-General of Police & Anor v. Alan Noor bin Kamat* [1988] 1 MLJ 260.
>
> In that case, a show cause letter to a police inspector which was instituted under the previous General Orders 'D' 30 (the equivalent of O. 26 in the instant case) failed to state therein the disciplinary proceeding was initiated with a view to dismissal or reduction in rank of the officer. This notwithstanding, the disciplinary authority acted to dismiss the said officer.
>
> The trial judge of the High Court, Ajaib Singh J, was minded to find that there was an implied right of the inspector to plead in mitigation before punishment of dismissal was imposed upon him in the following words:
>
> > The plaintiff sent a reply to the Deputy Inspector-General of Police on 7 June 1980 giving his explanations on the three charges. After considering these explanations and having found that the plaintiff had failed to exculpate himself it was incumbent upon the Inspector-General of Police thereafter to give the plaintiff an opportunity to make a plea in mitigation on punishment. This right of the plaintiff to be heard in

mitigation is implied in reg 27 of the General Orders and in art 135(2) of the Federal Constitution for otherwise it cannot be said that the plaintiff had been given a reasonable opportunity of being heard. He had to be heard throughout the proceedings from the beginning to the end. Isn't it a fair and reasonable expectation of any person condemned for a wrong that he would be heard in mitigation before any punishment is imposed on him?

On appeal, Salleh Abas LP, speaking for the Supreme Court held that the above passage was misleading and should be read in the context of the factual situation of that case. This was what he said:

As it stands, this passage appears to be misleading. This passage should be read in the light of the factual situation of this case, wherein the show cause letter dated 14 May 1980 was completely silent as to the contemplated punishment to be imposed at the end of the disciplinary proceedings. Therefore, in order to ensure that the respondent understood and appreciated the seriousness of the proceedings he was facing, the learned trial judge was right in insisting that another chance must be given to him, which he called a plea of mitigation. If however, the show cause letter had included the proposed punishment, for example, by the inclusion of such statement as 'This proceeding is taken against you with a view to dismissal or reduction in rank ...' or 'This proceeding is taken under GOD 30 with a view to dismissal or reduction in rank ...', or such other phraseology as would give the effect of making the respondent understand the nature of the proceedings and what it would lead to, there is no necessity for the appellants to give another opportunity of being heard before the punishment is being imposed.

This above passage could only be interpreted to mean that an officer has no sudh right to enter a separate plea of mitigation before sentence if the disciplinary authority had made it clear in the show cause letter that the disciplinary proceeding was initiated with a view to dismiss or to reduce him in rank. That right, it would appear from the judgment, had been construed to be no more inclusive than the right to make representation to exculpate himself which the plaintiff in the instant case was bound to make under O. 26(2).

To decide whether there was procedural unfairness to merit a judicial review on this ground therefore, one needs to ask the question whether the plaintiff in the present case had been made to understand and appreciate the seriousness of the proceeding he was facing by the inclusion in the show cause letter that it was initiated with a view to his dismissal. That letter (Agreed Bundle 2 at p. 2) was unequivocal in purpose – the plaintiff was required to show cause why he should not be dismissed in the following words appearing in para. 3:

Mengikut Perintah Am Bab 'D' 1980 tuan adalah dengan ini diminta memberi jawapan kepada pertuduhan-pertuduhan yang dikemukakan itu, dan memberi sebab-sebab mengapa tindakan tatatertib untuk tuan dibuang kerja sepatutnya tidak diambil terhadap tuan.

In the event, I am inclined to find that there is no merit on the submission.

> Before I leave this issue however, I must express my view on the very recent decision in *Utra Badi a/l K Perumal v. Lembaga Tatatertib Perkhidmatan Awam & Anor* [1998] 2 CLJ 306, which appears to be at variance with my decision.
>
> In that case, Vincent Ng J of the Penang High Court had ruled that an officer facing a disciplinary proceeding under General Order 26 must be given an opportunity to be heard in mitigation before punishment is imposed on him. Construing the ruling in *Alan Noor* to be merely obiter, he ruled that the failure to give the plaintiff in that case a right to mitigate on sentence before punishment was fatally flawed as the punishment itself involves a further decision making process, in the sense that it was still open to the disciplinary authority to consider whether to impose the more serious penalty of dismissal or the less serious reduction in rank.

With respect, I am not with his Lordship on this point – for the following reasons.

Firstly, the decision in *Alan Noor* was clearly not an *obiter dicta*, but a *ratio decidendi* which I am bound to follow – that unless the disciplinary authority had stated in its show cause letter to the plaintiff in that case that the proceeding taken against him was with a view to dismissal or reduction in rank, another chance must be given to him to plead in mitigation. Failure to do so in that case rendered the proceeding bad. It follows from the judgment that if it had been so stated, the plaintiff need not be given any such chance.

Secondly, at least in the context of the instant case, to say that the punishmentt itself involves a further process of decision making is not entirely correct. The disciplinary authority had already made up its mind (which it must under O. 26) when it issued the show cause letter to the plaintiff that the action was commenced with a view to his dismissal. It was of course, still open to the authority acting under O. 26(3) to impose a lesser punishment if after hearing the plaintiff, decides that he deserves any less. But that would be entirely at the sole discretion of the authority which it may exercise without having to hear any further from the plaintiff. It did not involve any decision-making process that would call into question the corresponding right of the plaintiff to be heard to the extent that a failure to hear him further could be construed as a procedural impropriety.

Thirdly, in my considered view, a plea in mitigation on sentence exists only in a trial in a court of law which employs a distinct form of procedure where the hearing is restricted to determining the guilt of an accused. A separate less formal inquiry is conducted after he is found guilty by the court to enable the appropriate sentence to be passed. It is only at this state that the accused is allowed to plead in mitigation. But a disciplinary inquiry is not a trial. The

officer is only required to exculpate himself as provided under O. 26(2). He is at liberty to plead for a lesser punishment but this must be incorporated in the representation he wants to make to the authority to exculpate himself. There could, therefore, be no question of a denial of his right under art 135(2) of the Constitution or under O. 23 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980.

Fourthly, the disciplinary procedure under the General Orders does not provide for a separate plea of mitigation before sentence. The legislature had not intended it to be so. There is no room for judicial creativity as the General Orders is sufficiently comprehensive on this aspect. To read into the orders such a right is unwarranted and is a derogation of the duty of the court to interpret the procedure according to the legislative intent of Parliament.

The second case is *Yap Jack Keet v. Ketua Polis Negara & Anor* [2000] 7 CLJ 74 where Clement Skinner JC said:

I next consider whether the plaintiff had a right to be heard in mitigation as a separate exercise before the imposition of a punishment on him in the context of the 1980 General Orders. The answer to this question has been authoritatively stated in the case of *Inspector-General of Police & Anor v. Alan Noor bin Kamat* [1988] 1 MLJ 260 – where it was held that there is no necessity to give an officer another opportunity to be heard in mitigation in respect of the punishment to be imposed on him if the show cause letter had indicated the proposed punishment. At p. 262 of its judgment this was what the Federal Court stated:

> ... If however, the show cause letter had included the proposed punishment, for example by the inclusion of such statement as 'the proceeding is taken against you with a view to dismissal or reduction in rank' or 'this proceeding is taken under G.O.D. 30 with a view to dismissal or reduction in rank' or such other phraseology as would give the effect of making the respondent understand the nature of the proceeding, and what they would lead to, there is no necessity for the appellants to give another opportunity of being heard before the punishment is imposed.

Counsel for the plaintiff relies instead on the case of *Utrabadi Perumal v. Lembaga Tatatertib Perkhidmatan Awam & Anor* in support of his submission that the plaintiff had a right to be heard in mitigation as a separate exercise before the imposition of a punishment on him. With respect, I decline to follow that decision for the reason that the learned judge there had decided that the decision of the Federal Court in the case of *Inspector-General of Police & Anor. v. Alan Noor bin Kamat* on this particular point was purely *obiter dicta.* To me, what was said by the Federal Court in *Alan Noor*'s case about an opportunity being afforded to an officer to be heard in mitigation was not *obiter dicta* but *ratio decidendi* on the particular point under consideration.

Reverting to the facts of our case, the letter of January 1993 sent to the plaintiff stated "... wajar dikenakan hukuman buang kerja." ("... appropriate to impose the sentence of dismissal"). There were accordingly, words in the letter of 7 January 1993 that conveyed to the plaintiff in no uncertain terms the contemplated punishment to be imposed on him. With such clear phraseology, there was in my view no necessity for the plaintiff to be given another opportunity of being heard.

Accordingly, we would answer the first question in the affirmative.

We now go to the second question which is:

Does Article 135(2) of the Federal Constitution require the relevant disciplinary authority to afford the public officer an oral hearing?.

We start off by quoting from the textbook "*The Constitution of Malaysia Its Development: 1957-1977"* edited by Tun Mohamed Suffian, H.P. Lee and F.A. Trindade. The essay entitled "*The Public Service and Public Servants in Malaysia"* by V.S. Winslow at pp. 290 and 291 has this to say:

A third question is whether the hearing needs to be an oral one. On this, *Najar Singh v. Government of Malaysia & Anor* [1976] 1 MLJ 203 is instructive. The Privy Council had to consider the appellant's argument that regulation 27 of the Chapter 'D' Regulations imposed an obligation to hear him orally, so that 'being heard' meant 'being heard orally', and that his dismissal after an opportunity to make his representations in writing was void. Their Lordships rejected this contention, Viscount Dilhorne saying:

The word 'heard' does not invariably connote an oral hearing. It can be used and is not infrequently used in relation to something written. The question, 'Have you heard from X' often means, 'Have you had a letter from X?' Its meaning must depend on the context in which it is used and the context in which it is used in these regulations shows that in regulation 27 it cannot have been intended only to mean an oral hearing.

Further, what was important was that the officer concerned should have had a full opportunity of stating his case before he was dismissed. As the Chapter 'D' Regulations did provide this and the appellant had apparently availed himself of the opportunity according to the detailed procedure, there was no denial of natural justice.

Najar Singh concerned regulation 27 in the Chapter 'D' Regulations, rather than Article 135(2) of the Constitution. However, as the wording of regulation 27 'follows' that in Article 135(2) there seems no doubt that all that Article 135(2) requires is a reasonable opportunity to make representations (whether orally or in writing).

In the Federal Court below, Suffian CJ (as he then was) suggested that if on the evidence, the plaintiff (appellant) had ever demanded an oral hearing and been refused, he might have had a stronger case ([1974] 1 MLJ 138 at p. 141). However in view of the Privy Council's views, it is unlikely that refusal of an oral hearing to a servant carries the same weight as refusal to allow cross-examination of witnesses against him (see *University of Ceylon v. Fernando* [1960] 1 All ER 631 at page 641), as he is still getting his opportunity to make representations and is not really likely to be prejudiced.

In the celebrated case of *Najar Singh v. Government of Malaysia & Anor.* [1974] 1 MLJ 138 at p. 140, Suffian CJ (as he then was) lucidly dealt with the point in this manner:

The next question is: was the plaintiff in the circumstances of this case given a reasonable opportunity of being heard? This involves consideration of the third issue.

As already stated, the plaintiff, though given a chance to explain in writing, was not given an oral hearing before his dismissal and it was argued that under paragraph 27 of Cap. D he should have been given an oral hearing. His counsel, Mr. Marjoribanks, cited passages from three cases which, he argued, made clear that the plaintiff was entitled to an oral hearing.

First, there was this passage from the advice of Lord Denning at p. 172 in *Surinder Singh Kanda v. Government of the Federation of Malaya* [1962] MLJ 169:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statement have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.

The second passage is from the speech of Lord Morris at page 113 in *Ridge v. Baldwin* [1964] AC 40 which is as follows:

> It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet; see *Kanda v. Government of the Federation of Malaya.*

Third, Mr. Marjoribanks cited *Durayappah v. Fernando* [1976] 2 AC 337 as authority for the proposition that even if the words of a statute clearly give a Minister power to dissolve a local council, he must nevertheless give the council an opportunity to explain before dissolving it and that the fact that there was urgency in dissolving the council was immaterial.

The word "heard" in clause (2) of article 135 of the Constitution and in paragraph 27 of Cap. D is derived from the word "hear" which is not defined in the constitution which governs this matter; in view of that we think that it should be given its ordinary everyday meaning. No doubt "to hear" is according to the Shorter Oxford Dictionary "to listen to; to give ear to; hearken to; to give audience to" – all of which imply that the plaintiff must be given facilities to make representations that could be perceived through the defendants' ears, not eyes, but that Dictionary also gives the following definitions of to hear: "to be informed of; to be informed; to learn." This makes clear that a hearing does not necessarily mean an oral hearing. Thus in the ordinary way one speaks of hearing from a friend whom one has received a letter, the words of which make an impact of one not through one's ears but through one's eyes.

We find support for our view in the words of Lord Loreburn LC at page 182 in *Board of Education v. Rice* [1911] AC 179:

> Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind, but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.
>
> Here too when deciding whether or not to dismiss the plaintiff the defendants were deciding a matter to be settled by discretion, involving no law, namely an administrative matter, and they are not bound to treat such a matter as a trial, they had no power to administer an oath and need not examine witnesses: all they had to do was to give a fair opportunity to the plaintiff for correcting or contradicting any relevant statement prejudicial to his view, of which here there is no question.

On appeal to the Privy Council, Viscount Dilhorne in delivering the judgment of the Board said:

The appellant does not complain that he was not informed in writing of the grounds on which his dismissal was to be considered. He does not complain of a breach of regulation 27 in that respect. His complaint is that he was not given an opportunity of being heard orally before being dismissed and he contends that regulation 27, which in this respect follows Article 135(2) of the Constitution, requires that before being dismissed he should have been given such an opportunity. He contends that "being heard" means "being heard orally".

The word "heard" does not invariably connote an oral hearing. It can be used and is not infrequently used in relation to something written. The question, "Have you heard from X", often means, "Have you had a letter from X?". Its meaning must depend on the context in which it is used and the context in which it is used in these regulations shows that in regulation 27 it cannot have been intended only to mean an oral hearing. Regulation 27 has to be read with regulation 30 and that makes no provision for an oral hearing if the officer fails to make representations in writing or the representations he makes in writing do not exculpate him. It is only if a Committee of Inquiry is appointed that he will be given the opportunity of giving oral evidence.

In their Lordships' opinion regulation 27 is not to be interpreted as imposing an obligation to hear an officer orally.

In a number of cases the argument has been put forward that the omission to hear a party orally was contrary to natural justice. In *Local Government Board v. Arlidge* [1915] AC 120 evidence had been given on behalf of Mr. Arlidge at a public inquiry but he claimed to be entitled to be heard orally by the Local Government Board to which he was appealing before they decided his appeal. The House decided that he was not so entitled, Viscount Haldane L.C. saying at page 134:

> I do not think the Board was bound to hear the respondent *(Arlidge)* orally, provided it gave him the opportunities he actually had.

In *The King v. Housing Appeal Tribunal* [1920] 3 KB 334 the appeal tribunal, having received the appellant's notice of appeal and the local authority's statement in reply, dismissed the appeal. It was held that under the rules of procedure applicable, the appeal tribunal might dispense with an oral hearing but that they were bound to give the appellant a hearing in the sense of an opportunity of putting his case, Sankey J, as he then was, saying at page 346:

> Now a hearing in my view need not be an oral one, it may be on written representations.

In *Malloch v. Aberdeen Corporation* [1971] 1 WLR 1578 Lord Wilberforce at page 1594 said:

> The appellant (a teacher) is entitled to complain if, whether in procedure or in substance, essential requirements, appropriate to his situation in the public service under the respondents, have not been observed, and, in case of non-observance, to come to the courts for redress.
>
> The particular principle of administrative law to which he appeals is that, before his dismissal became effective, he ought to have been given an opportunity of making written representations to or of being heard by the education authority ... The appellant has first to show that his position was such that he had, in principle, a right to make representations before a decision against him was taken. But to show this is not necessarily enough, unless he can also show that if admitted to state his case he had a case of substance to make.
>
> In this passage which was cited by counsel on behalf of the appellant, the context shows that the words "being heard" meant "being heard orally" but this passage is no support for the proposition that unless there is an oral hearing, there is a denial of natural justice. Indeed it points in the opposite direction. What is important is that the officer concerned should have a full opportunity of stating his case before he is dismissed. The chapter D Regulations 1969 provided this and the appellant availed himself of the opportunity, though as the content of his representations was not disclosed, their Lordships are unable to say whether he presented a case of substance.
>
> In the circumstances the plea by the appellant that there was a denial of natural justice must in their Lordships' opinion be rejected. As this plea was put forward, their Lordships have dealt with it though as the Regulations, which have the force by law, lay down a detailed procedure which was followed in this case, their Lordships do not consider that such a plea was really open to the appellant.

Three years later, Viscount Dilhorne made the same observation from another appeal in *Zainal bin Hashim v. Government of Malaysia* [1979] 2 MLJ 276 where the Board held that the right to be heard given by art. 135(2) of the Federal Constitution does not require that the person concerned be given an oral hearing and it could not be argued that the failure to give the appellant an oral hearing was a denial of natural justice.

This was followed in the Supreme Court case of *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia (supra)* where Jemuri Serjan CJ (Borneo) in delivering the judgment of the court dealt with the point through the following two passages:

> On the second issue – that the appellant be given the right to be heard orally in the form of an inquiry where witnesses may be called to be examined and cross-examined by his counsel – we are concerned with the basal consideration whether the words 'opportunity of being heard' connotes an oral hearing. What

amounts to 'hearing' in the context of the rule of natural justice or GO 23 or art. 135(2) of the Federal Constitution has been judicially considered and decided in many cases. This question was raised and argued in the case of *Local Government Board v. Arlidge* [1915] AC 120, and again in the case of *Kavanagh v. Chief Constable of Devon and Cornwall* [1974] 1 QB 624; *Jeffs v. New Zealand Dairy Production and Marketing Board & Ors.* [1967] 1 AC 551. Nearer home the authority for the proposition that 'hearing' does not connote oral hearing and that the right to be heard does not entail an obligation to hold an inquiry was decided in the case of *Najar Singh v. Government of Malaysia* [1974] 1 MLJ 138. Another Privy Council case of *Zainal bin Hashim v. Government of Malaysia* [1979] 2 MLJ 276 approved and adopted *Najar*'s case on this point. Again, the same question was raised and decided in the same way in the case of *A-G v. Ryan* [1980] AC 718.

We do not consider it necessary to review all the authorities and it is sufficient to refer only to the Privy Council case of *Najar Singh v. Government of Malaysia* [1974] 1 MLJ 138. Viscount Dilhorne who delivered the judgment of the Privy Council in that case at p. 205 explained the meaning of the words 'being heard' in the following words:

> In this passage which was cited by counsel on behalf of the appellant, the context shows that the words 'being heard' meant 'being heard orally' but this passage is no support for the proposition that unless there is an oral hearing, there is a denial of natural justice. Indeed it points in the opposite direction. What is important is that the officer concerned should have a full opportunity of stating his case before he is dismissed. The Chapter D Regulations 1969 provided this and the appellant availed himself of the opportunity, though as the content of his representations was not disclosed, their Lordships are unable to say whether he presented a case of substance.
>
> In the circumstances the plea by the appellant that there was a denial of natural justice must in their Lordships' opinion be rejected. As this plea was put forward, their Lordships have dealt with it though as the Regulations, which have the force by law, lay down a detailed procedure which was followed in this case, their Lordships do not consider that such a plea was really open to the appellant.

The Privy Council thus confirmed the decision of the Federal Court on the same issue. Incidentally, Viscount Dilhorne also delivered the judgment in *Zainal*'s case. Suffian CJ (Malaya) (as he then was) in the Federal Court of *Najar Singh v. Government of Malaysia & Anor* [1974] 1 MLJ 138 reviewed various authorities and dealt extensively with the meaning of the words 'the right to be heard' and decided that in the circumstances of that case, an oral hearing was unnecessary as the defendants had given the plaintiff a reasonable opportunity of being heard.

> There should not be anymore lingering doubt as to what the phrase 'right to be heard' or 'opportunity of being heard' mean at common law or in the statute, and it must be accepted that the issue has been settled, as well as can be on the authorities cited above. Therefore, this point is *cadit quaestio* ...
>
> Similarly, in this case, we have examined the relevant provisions of Ch D of the 1980 General Orders, and it is beyond dispute that these provisions have been assiduously followed by the respondent, and having regard to all the authorities cited earlier on an oral hearing or inquiry under the circumstances of this case was not justified. In dealing with Ch D of the 1980 General Orders we remind ourselves that we are dealing with General Orders that have legislative effect and we must guard ourselves against adding words into them which were never intended. In this regard, we found support in the passage of the judgment of Barwick CJ in *Twist v. Randwick Municipal Council* [1976] 136 CLR 106 at p. 110:
>
> > ... if the legislation has made provision for that opportunity to (be heard) to be given to the subject before his person or property is so affected, the court will no be warranted in supplementing the legislation, even if the legislative provision is not as full and complete as the court might think appropriate. Thus, if the legislature has addressed itsself to the question whether an opportunity should be afforded the citizen to be relevantly heard and has either made it clear that no such opportunity is to be given or has, by its legislation, decided what opportunity should be afforded, the court being bound by the legislation as much as is the citizen, has no warrant to vary the legislative scheme.

Subsequently, the same point was reiterated in *Ganasan a/l Marimuthu v. Public Services Commission (supra)* where the Court of Appeal held as follows:

> The Privy Council as well as the Supreme Court have held that in employing the procedure prescribed in general order 26 and the former reg. 30 of the general orders, the requirements of fairness have been satisfied by an opportunity to make written representations to the deciding body. In all such cases, it has been held time and again by the highest courts in the land that written representations will suffice and that a fair hearing does not mean that there must be an opportunity to be heard orally by the officer in person or by his lawyer at the disciplinary authority stage. It is only at the committee of inquiry stage that an oral hearing, and with it the desirability or otherwise of legal representation, can be considered.

All things considered, we would venture to say that this court may have fallen into error in granting leave on the second question. Especially so when it has been decided in *Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd* [1997] 3 CLJ 365 that it was necessary for each lower tier to accept loyally the decision of the higher tiers and chaotic consequences would follow should

the lower tier fail in this duty. It was therefore not open to an intermediate court of appeal, such as the Court of Appeal in this country, to disregard a judgment of a final court of appeal such as the Federal Court on the ground that it was given *per incuriam.*

We have to answer the second question in the negative.

In the result, our view is that the decisions of both the High Court and the Court of Appeal cannot be correct. The appeal is allowed with costs. The orders of the High Court and the Court of Appeal are accordingly set aside. Since there is no deposit by the appellants, we make no order on it.